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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEONTAE DAVEION DEAN, Defendant and Appellant.	B258746 (Los Angeles County Super. Ct. No. BA408344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Deontae Dean of first degree murder and found not true the special circumstances that Dean intentionally killed the victim by means of lying in wait and for financial gain. The jury found true the special allegation that Dean used a deadly or dangerous weapon, in this case, a metal pipe. The trial court sentenced Dean to a prison term of 25 years to life for the first degree murder conviction and a consecutive one-year term for the deadly weapon enhancement.

Dean argues the trial court erred in responding to a question from the jury and in instructing the jury on self-defense. He also contends the prosecutor committed misconduct by misstating the law on two theories of first degree murder. Because Dean's trial counsel did not object to any of these alleged errors, and to avoid forfeiture of his arguments on appeal, Dean contends that his counsel's failures to object constituted ineffective assistance and that he was prejudiced by the cumulative effect of the errors.

We reject Dean's contentions that the trial court committed error but agree that his trial counsel's performance was deficient in failing to object to prosecutorial misconduct. Because we conclude his counsel's deficient performance did not prejudice him, however, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We described the facts leading up to the murder in a previous, unpublished opinion in *People v. Lavatai,* case No. B264293. The facts of the two cases ultimately diverge, however,

because Dean and his codefendant Mika Lavatai were tried separately, and Dean, unlike Lavatai, testified at his trial. The testimony of the percipient witnesses was substantially similar in both trials.

A. *Juan Carlos Renteria Goes Dancing with His Girlfriend*

In August 2012 Juan Carlos Renteria had been dating Mariela Orellana for approximately two months. Prior to that, she had been dating Armando Campos for two years. When Orellana began dating Renteria, Campos became jealous, told Orellana that he wanted to resume their relationship, and said that Renteria was a "womanizer" and a "bad person."

On August 8, 2012 Renteria went dancing with Orellana at a restaurant in the City of Commerce at approximately 11:30 p.m. Approximately one hour later, early on August 9, Orellana saw Campos at the restaurant, although Campos left before she and Renteria did.

Renteria took Orellana home and left her house shortly before 3:00 a.m. They made plans to see each other the next day. Orellana later tried to reach Renteria, but her text messages to him were not returned.

B. *Dean and Lavatai Attack Renteria*

In the early morning hours of August 9 Renteria's brother Armando was lying on the couch watching television in the Renteria family's second floor apartment. Earlier in the evening he had seen a heavy-set man, later determined to be Dean, sitting on the curb, wearing all black clothing, gloves, and a hoodie covering his head. When Armando heard the sound of

Renteria's truck, he "looked out the window to check that [Renteria] was coming inside the house." Armando saw Renteria start to open the apartment building door, turn around, and go to the man sitting down at the curb. Armando then observed a second man, dressed in black, approach Renteria from behind and hit him on the back of the head. Armando ran downstairs and out to the street.

When Armando arrived outside, the two men were attacking his brother in the street. Renteria told Armando not to help him or get involved. The two men continued to hit Renteria.

Renteria's sister, Esmeralda, had been sleeping, but awoke when she heard Armando screaming. She looked out the window and saw two individuals fighting with her brother. She screamed at them to stop, and then ran downstairs. When she arrived outside, she saw that Renteria was "bleeding a lot." She saw the two men "punching" her brother, the blows landing so hard she could hear them hitting against her brother's body. She also saw that both of the attackers had weapons, one of them sharp.

Renteria's other brother, Ricardo, had also been sleeping in the apartment when he awoke to the sound of people screaming. Ricardo ran downstairs and saw the heavy-set man hitting his brother with an object, his hands "clasped" around it like he was "swinging a bat." Ricardo went inside to call the police.

The two men ran away after Esmeralda told them she had called the police. Armando approached his brother and saw "a lot of blood" and that he was unconscious. Renteria regained consciousness and began walking toward the house, but collapsed at the door. He fell into the arms of Esmeralda and said, "Call 911, I'm bleeding a lot." An ambulance came and took him to the hospital.

Renteria died from a stab wound to the heart. He had six separate stab wounds, including four to the back, one to the arm (a defensive wound), and one to the chest. He also had multiple abrasions and bruises on his wrist and hands.

C. *Dean Explains to Law Enforcement That He Attacked Renteria at the Request and Direction of Campos*

Detective Kevin Acebedo and another deputy subsequently spoke with Dean, who admitted in a recorded interview the People played for the jury that he and Lavatai attacked Renteria pursuant to Campos's request and instructions.[1] Dean told Deputy Acebedo that he had never previously met the man he and Lavatai attacked, who Dean ultimately learned was Renteria. He agreed to do it because Campos told him Renteria was "beating on" Campos's ex-girlfriend and because Campos offered to take care of Dean, who was homeless at the time, perhaps by helping him pay for a room. Dean knew Campos from a computer lab that Campos owned or managed and where Dean and Lavatai went to use the computers.

Dean explained that the night before the attack Campos drove him and Lavatai to the building where Renteria lived, and Campos told the men to "fight a dude" there. He showed them Renteria's truck and a picture of Renteria he had in the back of the computer shop.

The night of the attack, Campos picked up Dean and Lavatai and drove them to Renteria's apartment, where they

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[1] The People also played a videotape of the incident taken from a surveillance camera at a store next door to Renteria's apartment.

waited for him to come home. Dean told Detective Acebedo that he fell asleep in Campos's car on the way there because he has "sleep apnea." Dean said he brought a pipe with him "in case anything happen[ed]," but also told Detective Acebedo that he saw the pipe at the scene and "grabbed it." He said he did not know if Lavatai also had a weapon. Dean explained that he wore all black because those were the only clothes he had, but he admitted to wearing a "rag" over his face because he did not "want you to see who I am." "I wanna be smart," he said.

Dean stated he was sitting on the curb when Renteria arrived in his truck. Renteria walked to the door of his apartment, but then turned back and approached Dean, tapped him on the shoulder, and asked, "Hey, are you all right?" Dean said, "As soon as I jumped up and it looked like I'm about, I'm about to fire . . . . He swings for me." At one point Dean told Detective Acebedo that Renteria hit him first, and at other times he said he hit Renteria first. In either case, he said Lavatai "came right after," out "from the side." Dean said he hit Renteria "a couple times" on his legs. "[H]e was really trying to fight back," Dean said, and suggested that Renteria was getting the best of Lavatai. Dean told Detective Acebedo that he did not know that Lavatai had stabbed Renteria or that Renteria was bleeding during the fight. "[H]ow did, like, he . . . die, I only, like, hit him twice," Dean asked the Detective. "I really just wanted to scare him," he said.

Dean stated that after the fight he and Lavatai ran off, and Campos picked them up. Dean said he fell asleep again in the car. Dean said he, Lavatai, and Campos never spoke of Renteria again, and Dean did not know Renteria had died. "[T]hat shit was not supposed to happen like that," he said, they were just

"supposed to catch a fade."[2] He also said Campos never paid him for the attack on Renteria.

D. *Dean Testifies at Trial*

At trial, the parties stipulated that Lavatai stabbed Renteria and that Dean used a pipe in the attack on Renteria. Dean testified that he, Campos, and Lavatai never planned to attack Renteria. Instead, Campos merely asked Dean to "back him up" in a "confrontation" with Renteria. Dean said he agreed to "help out" Campos as "a friend," and that Campos never offered to pay him in any way for his assistance.

Dean stated he had been up for three to four days before the attack, high on methamphetamine, and he did not remember much about the attack or the events leading up to it. He did remember that Campos picked him up at a convenience store on the night of the attack and that he fell asleep in the front seat of the car while Lavatai sat in back. When Dean woke up, Campos told him to get out of the car and said he and Lavatai would be "right back." Dean walked to a curb where he sat down and fell asleep again.

Dean stated he woke up when someone touched him. "When I start to get up a fight went on. . . . When I looked at who was fighting, which I didn't fight, it was one of my friends. That's when I -- at first I thought, okay, he can handle it himself, but when I start seeing he was getting more the best of him that's when I decided I wanted to try to get him off of him." Dean said he "was panicking" and grabbed the metal pole he had brought

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2 Dean explained to Detective Acebedo that "catching a fade" means "going to box" or fight.

with him and swung, trying to get Renteria "off of [Lavatai]." "When he let go and I seen that they separated from each other, that's when I took off."

Dean testified he never saw Lavatai get out of Campos's car and he did not know Lavatai had a knife or had stabbed Renteria. He stated he did not notice Renteria bleeding. He explained he was wearing gloves and a mask because he always wears them, even in the summer. Dean said that after running from the scene he blacked out, but he remembered vomiting some time later.

Dean testified that he was "high" during his interview with Detective Acebedo. Detective Acebedo later testified that Dean did not appear high or under the influence. He said Dean was lucid and, although Dean was evasive early in the interview, he became more cooperative.

E. *The Court Instructs the Jury on Murder and the Special Circumstance of Lying in Wait*

At trial the People advanced two theories of first degree murder: (1) willful, deliberate, and premeditated murder; and (2) murder by lying in wait. (See Pen. Code, § 189.)[3] The People also alleged the lying-in-wait special circumstance pursuant to which the court could have sentenced Dean to death or to life without the possibility of parole had the jury found the special circumstance true. (See § 190.2, subd. (a)(15).)

In connection with murder, the court instructed the jury with CALCRIM Nos. 520 and 521. CALCRIM No. 520 provides in relevant part:

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[3] Statutory references are to the Penal Code.

"The defendant is charged in Count One with murder in violation of Penal Code section 187. To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant committed an act that caused the death of another person;

"AND

"2. When the defendant acted, he had a state of mind called malice aforethought.

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if he unlawfully intended to kill.

"The defendant acted with implied malice if:

"1. He intentionally committed an act;

"2. The natural and probable consequences of the act were dangerous to human life;

"3. At the time he acted, he knew his act was dangerous to human life;

"AND

"4. He deliberately acted with conscious disregard for human life.

"[¶] . . . [¶]

"If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in Instruction Number 521."

CALCRIM No. 521, as modified for this case, instructed the jury on the People's theories of first degree murder, including both willful, deliberate, and premeditated murder and lying-in-

wait murder. In connection with lying-in-wait murder, the court instructed the jury as follows:

"The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

"1. He concealed his purpose from the person killed;

"2. He waited and watched for an opportunity to act;

"AND

"3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed.

"The lying in wait does not need to continue for any particular period of time but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. Deliberation means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with premeditation if the decision to commit the act is made before the act is done.

"A person can conceal his purpose even if the person killed is aware of the person's physical presence.

"The concealment can be accomplished by ambush or some other secret plan.

"The requirements for second degree murder based on express or implied malice are explained in Instruction Number 520, First or Second Degree Murder With Malice Aforethought.

"The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have proven the defendant has committed murder but have not met this burden of proving it was

first degree murder, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

In connection with the lying-in-wait special circumstance, the court instructed the jury with CALCRIM No. 728, stating in relevant part:

"To prove that this special circumstance is true, the People must prove that:

"1. The defendant intentionally killed Juan Carlos Renteria;

"AND

"2. The defendant committed the murder by means of lying in wait.

"A person commits a murder by means of lying in wait if:

"1. He concealed his purpose from the person killed;

"2. He waited and watched for an opportunity to act;

"3. Then he made a surprise attack on the person killed from a position of advantage;

"AND

"4. He intended to kill the person by taking the person by surprise."

The court provided the jury a booklet of jury instructions, which included CALCRIM No. 521 (first degree murder) at page 15 and CALCRIM No. 728 (lying-in-wait special circumstance) at page 20.

F. *The Court Responds to a Jury Question About the Lying-in-wait Theory of First Degree Murder and the Lying-in-wait Special Circumstance*

During deliberations the jury sought clarification of the difference between "lying in wait for [first] degree murder and

lying in wait for [the] special circumstance." The jury asked, "Is there a difference in [the] standard?" In the course of responding to the jury's question, the court and Juror No. 5 engaged in the following discussion:

"The Court: Instruction No. 521 and the part on page 15 that talks about lying in wait as a theory of first degree murder spells out the elements one, two, three. . . . If you turn to page 20, which is Instruction 728, which deals with lying in wait as a special circumstance, it tells you that there are two elements. One, the defendant intentionally killed Juan Carlos Renteria and, two, the defendant committed the murder by means of lying in wait. So the first thing it requires is an intent to kill. Then, in defining lying in wait for the purpose of the special circumstance, you see the same three elements listed, one, two, three, that are in the lying in wait definition for the theory of first degree murder. Do you follow? One, two, three are the same in both instructions.

"Juror No. 5: Yes.

"The Court: Then you see the fourth element, which is he intended to kill the person by taking the person by surprise. That's additional. So the definition of lying in wait has that fourth element for the special circumstance allegation, not for the theory of first degree murder. Do you follow me?

"Juror No. 5: I follow."

Shortly thereafter, Juror No. 1 posed another question:

"Juror No. 1: So there [are] two types of lying in wait?

"The Court: No. You have the substantive charge of murder. Then separate from that is the concept of a special circumstance, okay? And although they're both called lying in wait, they're for different reasons. If you're determining whether

the defendant has been proven guilty of murder, particularly first degree murder, there are different ways you can get to first degree murder in this case. One would be if you find that it's willful—it was committed willfully, deliberately, and with premeditation. A separate theory is that it was committed by lying in wait, and that's defined in the elements on page 15 [CALCRIM No. 521], one, two, and three, okay? That just is, is it first degree or not.

"If you find that the murder was committed and it was first degree then you would, obviously, have to decide whether the People have proved the special circumstance allegation, which is a whole different concept, okay? They have the same name, but don't get confused by that.

"Juror No. 1: Okay.

"The Court: It's a different—it's a special allegation that only attaches if you find the defendant guilty of first degree murder. All right. Does anybody else have any questions?

"[¶] . . . [¶]

"Juror No. 1: So is intent an element of the lying in wait on page 15 [of] the instruction[s]?

"The Court: No. That's the point. [¶] If you are determining whether it's a willful, deliberate, and premeditated murder, obviously, an intent to kill is part of that. That's what willful means, an intent to kill, okay? You could find, for example—the jury doesn't have to—if you were to find the defendant guilty of first degree murder, you do not all have to agree on the same theory. Six of you can say it's willful, deliberate, and premeditated, and six of you could say it's lying in wait, okay? Or you could all say it's both. Or you could find him not guilty of first degree murder by saying it's neither.

"It's just—I think, as [the prosecutor] said in his argument, you've got different roads to the same place, all right? But intent to kill is not part of lying in wait in determining whether murder was first degree. But if you find it first degree regardless—you could, for example, find first degree murder. Then you get to the special circumstance, and you could find an intent to kill as outlined in the instruction on page 20 [CALCRIM No. 728] and all that. You could find it's true, or you could say, no, we don't find all the elements proved there, and it's not true, and that wouldn't affect whether you found the defendant guilty or not guilty of first degree murder. They're two different concepts, okay?

"Juror No. 5: Thank you, Your Honor."

G. *The Jury Convicts Dean, and the Trial Court Sentences Him*

The jury found Dean guilty of first degree murder and found true the allegation that he personally used a deadly or dangerous weapon. The jury found not true the special circumstances of murder by lying in wait and for financial gain. The trial court sentenced Dean to 26 years to life (25 years to life for first degree murder plus one year for the weapon enhancement), awarded 578 days of actual custody credit, and imposed various fines and fees. Dean timely appealed.

DISCUSSION

Dean contends (1) the trial court erred in responding to the jury's question about the difference between lying-in-wait first degree murder and the lying-in-wait special circumstance; (2) the

trial court erred when it instructed the jury on the law of self-defense; and (3) the prosecutor committed misconduct by misstating the law on two theories of first degree murder. Dean further contends that each of these alleged errors and the prosecutor's misconduct prejudiced him. Dean, however, never objected at trial to any of these alleged errors or the prosecutor's alleged misstatements, thus forfeiting these arguments on appeal. (See *People v. Clark* (2016) 63 Cal.4th 522, 577 ["[t]o preserve a claim of prosecutorial misconduct on appeal, 'the defense must make a timely objection at trial and request an admonition'"]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1352 [by agreeing with the trial court's response to a jury question, the defendant forfeited the argument that the response was erroneous]; *People v. Battle* (2011) 198 Cal.App.4th 50, 64-65 [in general the "[f]ailure to object to instructional error forfeits the issue on appeal"][4].)

Dean contends, however, that his trial counsel provided ineffective assistance by failing to object in each of these instances of error or misconduct. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*) ["'[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's

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[4] Although recognizing the failure to object forfeited his other contentions, Dean argues that we may review the instructions given "if the substantial rights of the defendant were affected thereby." (See § 1259.) We ultimately conclude that the alleged error did not substantively affect his rights in the context of determining whether his counsel provided ineffective assistance by failing to object. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

constitutional right to the effective assistance of counsel'"]; accord, *People v. Lopez* (2008) 42 Cal.4th 960, 966.)

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

A. *Trial Counsel for Dean Was Not Ineffective by Failing To Object to the Trial Court's Response to the Jury Question on Lying in Wait*

Dean contends that his trial counsel provided ineffective assistance by failing to object to the court's response to the jury's

question on the "standard" for lying in wait because the court's response was incomplete in that the court failed to inform the jury that lying-in-wait first degree murder requires the jury to find implied malice. Dean also contends that, as a result of the response, "the jury was allowed to convict [Dean] of first degree lying in wait murder without the necessary finding of implied malice." Dean, however, cannot satisfy his burden of showing that his counsel's performance fell below an objective standard of reasonableness because the court's response to the jury's question accurately stated the law and was not objectionable.

The jury's question required the court to comply with section 1138, which provides in relevant part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . ." Section 1138 requires the trial court "'to help the jury understand the legal principles it is asked to apply.'" (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1179; see *People v. Loza* (2012) 207 Cal.App.4th 332, 355 [section 1138 "creates a '"mandatory" duty to clear up any instructional confusion expressed by the jury'"].) "This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*Montero*, at p. 1179; accord, *People v. Hodges* (2013) 213 Cal.App.4th 531, 539.) We review a trial court's response to a jury question for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746; *Hodges*, at p. 539.)

The trial court instructed the jury on murder with CALCRIM No. 520 before instructing the jury on lying-in-wait murder and the lying-in-wait special circumstance. CALCRIM No. 520 informed the jury that the People had to prove Dean acted with malice aforethought to find him guilty of murder and that malice can be express or implied. The instruction also informed the jury, "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in Instruction No. 521."

Dean did not at trial and does not on appeal argue that CALCRIM No. 520 does not accurately state the law. Indeed, the court's instructions on murder were "full and complete," and the jury's question did not require the court to elaborate on them. (*People v. Montero*, *supra*, 155 Cal.App.4th at p. 1179; see *People v. Hodges*, *supra*, 213 Cal.App.4th at p. 539.) Instead, the jury asked only for the difference between lying-in-wait murder and the lying-in-wait special circumstance. As instructed, the jury would have only considered these issues if it already had determined Dean was guilty of at least second degree murder, which includes a finding of express or implied malice. Thus, the court did not abuse its discretion by failing to remind the jury of the elements of second degree murder.

Moreover, the trial court's response to the jury question accurately stated the law. The court correctly stated that the distinction between lying-in-wait first degree murder and the lying-in-wait special circumstance is the element of intent to kill. (See *People v. Poindexter* (2006) 144 Cal.App.4th 572, 579 ["'[l]ying in wait as a form of first degree murder . . . should not be confused with the largely similar, but slightly different, special

circumstance in which the "defendant *intentionally* killed the victim *while* lying in wait,"'" quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2]; see also §§ 189, 190.2, subd. (a)(15).) Thus, because the court's explanation to the jury was not objectionable, the failure of Dean's trial court to object was not ineffective assistance of counsel. (See *People v. Loza*, *supra*, 207 Cal.App.4th at p. 359 ["the trial court provided an appropriate, legally correct response to the jury's question[, and] [t]he fact that defense counsel neither objected to, nor requested additional explanation of, the court's response to the jury's question cannot be deemed deficient performance"].)

B. *Trial Counsel for Dean Was Not Ineffective by Failing To Object to the Court's Instruction on Self-defense*

Dean next contends that his trial counsel provided ineffective assistance by failing to object to CALCRIM No. 3472, which states, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Dean argues that this instruction, in combination with certain statements by the court and the prosecutor, "essentially prevented [him] from arguing a theory of self-defense or imperfect self-defense" by suggesting that the right of self-defense is never available where the defendant provokes a fight. In support of his contention, Dean cites *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*), which held that, under the circumstances of that case, CALCRIM No. 3472 prevented the jury from considering the defendants' claims of self-defense. (*Id.* at p. 945.) Because the circumstances of this case supported the instructions the court gave, however, the

failure of Dean's trial counsel to object to CALCRIM No. 3472 was not ineffective assistance.

Before closing arguments the court conferred with counsel for Dean and the prosecutor to discuss jury instructions. They discussed, among other things, Dean's defense theories, including self-defense and defense of others. The court expressed some skepticism about Dean's ability to argue self-defense but ultimately agreed to instruct on all of the defense's theories, and the People did not object. The court instructed the jury on self-defense, defense of others, involuntary manslaughter, voluntary manslaughter, and voluntary intoxication.

In closing argument counsel for Dean emphasized defense of others, arguing: "It's not really self-defense in this case. . . . The argument here is really that Mr. Dean wakes up and sees Mr. Renteria fighting with Mr. Lavatai." Counsel for Dean argued that the jury could find Dean guilty of voluntary manslaughter, but urged the jurors to find him guilty of only involuntary manslaughter, meaning that Dean did not act with a conscious disregard for human life. (See *People v. Bryant* (2013) 56 Cal.4th 959, 970-971; CALCRIM No. 580.) Dean appears to argue on appeal that the court's skepticism for his self-defense theories, in combination with CALCRIM No. 3472, prevented him from arguing self-defense and imperfect self-defense, as opposed to defense of others.

The record does not support Dean's suggestion that the court's skepticism affected the scope of his closing argument. After discussing the jury instructions with the parties, the court agreed without any objection by the prosecutor to instruct the jury on self-defense and imperfect self-defense. Rather than strenuously argue these defenses, counsel for Dean apparently

made a tactical decision to stress what he believed was Dean's most promising argument, defense of another. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531 ["[f]ailure to argue an alternative theory is not objectively unreasonable as a matter of law"]; accord, *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1159; see also *Yarborough v. Gentry* (2003) 540 U.S. 1, 8 ["[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect"].)

Dean's objection to CALCRIM No. 3472 in combination with statements made by the prosecutor is more substantive but no more meritorious. In his closing argument, the prosecutor asked the jury to consider how Dean could have a right of self-defense given that he "provoke[d] a quarrel by going to the victim's house, sitting there, lying in wait." The prosecutor continued: "So how could he in this case turn the situation around and say, 'I have a right to self-defense because . . . when I woke up the victim was about to swing on me, so I swung on him first with a baton, and I saw the victim picking up Lavatai, so I had to go beat up the victim because he was getting the best of Lavatai?'" Dean argues that these statements, in combination of CALCRIM No. 3472, support his contention that the jury mistakenly believed Dean could not benefit from the defenses of self-defense or defense of others because he provoked the fight.

Under the circumstances of this case, however, Dean could not avail himself of those defenses. The court in *Ramirez* held that CALCRIM No. 3472 misstates the law and denies a defendant the "right of self-defense against an adversary's deadly attack, even if the defendant contrived to provoke a confrontation to use only nondeadly force against the adversary." (*Ramirez*,

supra, 233 Cal.App.4th at p. 945.) Here, the evidence showed that Dean used deadly force by attacking Renteria with a deadly weapon—a two-foot long metal pipe—but Renteria did not use deadly force against Dean. (See *People v. Jurado* (2006) 38 Cal.4th 72, 138 [metal pole 12 to 18 inches long "is a deadly weapon" because it is "capable of inflicting great bodily injury or death"]; *People v. Huynh* (2002) 99 Cal.App.4th 662, 679 [a steering wheel locking device consisting of two steel rods "would certainly constitute a deadly weapon"].) Swinging the metal pipe like a baseball bat, as Renteria's brother Ricardo testified Dean did, undoubtedly can cause serious bodily injury or death and thus constitutes deadly force. (See *In re D.T.* (2015) 237 Cal.App.4th 693, 701 [use of a weapon ""in such a manner as to be *capable of producing* and *likely to produce,* death or great bodily injury"" constitutes use of deadly force]; *People v. Russell* (2005) 129 Cal.App.4th 776, 788 ["the injury-producing potential" and not the actual injuries suffered by the victim determines whether the defendant used deadly force].)

Moreover, in *Ramirez* the defendants believed their adversary suddenly escalated the confrontation from non-deadly to deadly force by brandishing a gun. (*Ramirez*, *supra*, 233 Cal.App.4th at p. 945.) In contrast, although Dean testified that he thought Renteria was "getting the best" of Lavatai, there was no evidence that Renteria escalated the confrontation "to deadly violence." (See *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334 [distinguishing *Ramirez* and stating that "CALCRIM No. 3472 is generally a correct statement of law, which might require modification in the rare case in which a defendant intended to provoke only a non-deadly confrontation and the victim responds with deadly force"].) Thus, Dean did not have the right to use

deadly force to defend himself or Lavatai from Renteria's lawful, non-deadly use of force. (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 272 ["as the initial aggressor and with [the victim] having acted lawfully, [the defendant] may not rely on imperfect self-defense"].) In addition, the prosecutor's statements in his closing argument accurately reflected the law of self-defense. The prosecutor reminded the jury that Dean used a "baton" in the fight, which the jury found was a deadly weapon.

Dean's suggestion that the jury thought it could not find Dean guilty of a lesser crime based on self-defense or defense of others "even if [Dean] only intend[ed] to engage in a fistfight" misstates the facts. Dean stipulated that he used a pipe in the confrontation and testified that the pipe was two feet long and made entirely of metal, "like a police baton but it was more metal." He therefore fought Renteria using deadly force, not merely his fists. The court did not err by instructing the jury with CALCRIM No. 3472, and counsel for Dean's failure to object to the instruction was not ineffective assistance.

C. *Trial Counsel for Dean Was Not Ineffective Because His Failure To Object to Prosecutorial Misconduct Did Not Prejudice Dean*

Dean argues that his trial counsel provided ineffective assistance by failing to object to alleged misstatements of law by the prosecutor during his closing argument. Those statements and an accompanying PowerPoint presentation addressed the

elements of first degree murder by aiding and abetting and by lying in wait.[5]

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citations.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.] '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*Centeno*, *supra*, 60 Cal.4th at pp. 666-667; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 61-62.)

"Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Cortez* (2016) 63 Cal.4th 101, 130; *People v. Hill* (1998) 17 Cal.4th 800, 819.) "Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible

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5 The People also urged the jury to find Dean guilty of first degree murder because the killing was premeditated, willful, and deliberate, but Dean does not contend that the prosecutor committed misconduct in connection with this theory of first degree murder. We consider Dean's arguments of ineffective assistance because we cannot conclude beyond a reasonable doubt that the jury based its verdict on this theory of first degree murder. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167.)

methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citations.] However, [the defendant] does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*Cortez*, at p. 130; *Centeno*, *supra*, 60 Cal.4th at p. 667.) "'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Centeno*, at p. 667.)

1. *The Prosecutor's Statements Regarding Aiding and Abetting Did Not Misstate the Law*

The People argued Dean was liable for Renteria's murder under two theories of aiding and abetting. First, the People argued that Dean was liable for direct aiding and abetting because he knowingly and intentionally aided and abetted Lavatai's murder of Renteria. Second, the People argued that, even if Dean and Lavatai did not intend to kill Renteria, Dean was liable for aiding and abetting his murder because Renteria's death was the natural and probable consequence of the actions of Dean and Lavatai. In *People v. Chiu* (2014) 59 Cal.4th 155 the Supreme Court held that only a direct aider and abettor has the requisite intent and knowledge for first degree murder. (*Id.* at p. 167.) Thus, a defendant cannot be convicted of first degree murder as an aider and abettor under the natural and probable consequences doctrine. (*Id.* at p. 166.) Dean contends that the prosecutor misled the jury into believing it could convict him of first degree murder based on the natural and probable

consequences theory of aiding and abetting. The record does not support Dean's argument.

In his closing argument the prosecutor addressed first Dean's liability for murder generally, including first degree murder. He then addressed two theories of aiding and abetting, beginning with direct aiding and abetting. In that context, he told the jury, "[Dean] knew that [Lavatai] intended to commit the crime before or during the commission of the crime. [Dean] intended to aid and abet, and he did in this case." The context of the argument makes it clear that the prosecutor was using "crime" here to refer to murder.

The prosecutor then introduced the concept of the natural and probable consequences doctrine by asking the jury, "What if some of you go back there and say, 'You know, I'm not convinced. I'm not convinced that [Dean] knew about it.'" The prosecutor explained in that instance the jury still could hold Dean liable for Renteria's death under the natural and probable consequences doctrine of aiding and abetting: "If you intend to aid and abet in one crime, and a second crime is reasonably foreseeable, you are not only guilty of the crime that you intend to help, but you are also guilty of the second crime if the second crime is reasonably foreseeable for the first crime." After discussing the evidence supporting this theory of liability, the prosecutor stated, "So even [if] for some reason you go back there and you say, 'Well, I don't think [Dean] knew [Lavatai] had a knife,' he's still guilty of murder under the theory of natural and probable consequence."

Dean points to two instances later in the prosecutor's closing and rebuttal arguments where Dean contends the prosecutor conflated the theories of direct aiding and abetting (which can support a conviction for first degree murder) and

aiding and abetting a crime whose natural and probable consequence is death (which can support a conviction for second but not first degree murder). First, toward the end of his closing argument, the prosecutor stated: "But if you seriously, honestly, and objectively look at the facts of this case, look at the law of aiding and abetting, at the law of natural and probable consequence, okay? Take all those into consideration, you're going to find that the defendant is guilty of murder. Not anything else. Murder of the first degree against the victim in this case." Immediately following this statement, however, the prosecutor said: "And you're going to find the special circumstances true that he was lying in wait. Clearly he was lying in wait based on the evidence. And he did it for financial gain. He had a motive to do it. He had a motive to do it because he was promised." The prosecutor concluded this argument by telling the jury, "I'm confident that . . . you're going to find [Dean] guilty of first degree murder."

Second, Dean points to statements the prosecutor made in his rebuttal argument in which he summarized the evidence in the case and applied it to various legal theories. In connection with the natural and probable consequences theory of aiding and abetting, the prosecutor stated: "[E]ven if you take [Dean's] statement to the police at face value that he only intended to go catch a fade, that he didn't know Lavatai was armed with a knife and he didn't know that the victim was bleeding, even if that was his intention, even if that was what he wanted to do initially, it's reasonably foreseeable that if you arm yourself and—you plan this thing out, you arm yourself with a weapon like a baton to beat the victim, that your partner might do something crazy like stab the guy—it's not one of these things where it happened and

you said, Oh, my God, I never in a million years would have seen this coming. It's reasonably foreseeable, so therefore he's also guilty of murder under that theory." The prosecutor then addressed voluntary manslaughter, involuntary manslaughter, and related concepts before concluding his argument, stating, "He's guilty of the crime of first degree murder based on the law of aiding and abetting. Find the special circumstance true. Find the special allegation true. Hold him accountable for his actions."

In neither instance did the prosecutor misstate the law. He never told the jury that it could convict Dean of first degree murder under the natural and probable consequences theory of aiding and abetting. While it is true that the prosecutor asked the jury in his closing argument to convict Dean of first degree murder on the heels of his discussion of the natural and probable consequences doctrine, he did so in the context of his broader summation on murder, not directly in connection with the discussion of the natural and probable consequences doctrine. In his rebuttal argument, the prosecutor argued only that Dean was guilty of "murder" under the natural and probable consequences doctrine, which is a legally permissible conclusion. The prosecutor did not mention degrees of murder until much later, after he discussed voluntary and involuntary manslaughter, and even then the prosecutor did not say that the jury could convict Dean of first degree murder under the natural and probable consequences doctrine. The prosecutor did not misstate the law of aiding and abetting.

Moreover, even if the prosecutor's statements could be interpreted to misstate the law, it is not reasonably likely that the jury applied the wrong standard in considering Dean's guilt under the theory of aiding and abetting. The court properly

instructed the jury on both direct aiding and abetting and aiding and abetting under the theory of natural and probable consequences.[6] Dean does not argue that these instructions misstated the law or misled the jury, and there is nothing in the record supporting Dean's contention that the prosecutor made any statements inconsistent with the court's instructions. In the absence of evidence in the record to the contrary, we presume that the jury followed the court's instructions. (See *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Reyes* (2016) 246 Cal.App.4th 62, 77-78.)

2. *The Prosecutor's Statements Regarding Lying-in-wait First Degree Murder Misstated the Law*

In his closing argument the prosecutor told the jury that murder is defined as the unlawful killing of a human being done with malice aforethought. He then explained the two types of malice, express and implied, and stated that implied malice is "an intent to do something knowing that it's deadly and you did not care about the consequences." Before discussing the degrees of murder, the prosecutor told the jurors that they did not all have

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6 In connection with the latter theory, the court instructed the jury, "Before you may decide whether the defendant is guilty of murder in the second degree under the natural and probable consequence theory, you must decide whether he is guilty of assault with a deadly weapon other than a firearm. Thus, to prove that the defendant is guilty of murder in the second degree, the People must prove that . . . a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault with a deadly weapon other than a firearm."

to agree on the type of malice, "as long as you agree that it's murder." Up to this point, the prosecutor's argument was proper.

"How do we go from second degree murder to first degree murder?" the prosecutor asked rhetorically. "There are three more elements that we have to prove to you . . . willful, deliberate, and premeditated." The prosecutor summarized the evidence that he argued supported this theory of first degree murder. "That's one theory of murder," he said. He then told the jury to imagine theories of murder as "highways to reach a destination." "So in this case I just talked to you about murder with malice aforethought. That's one way to get to murder. What's the second way to get to murder? . . . Lying in wait."

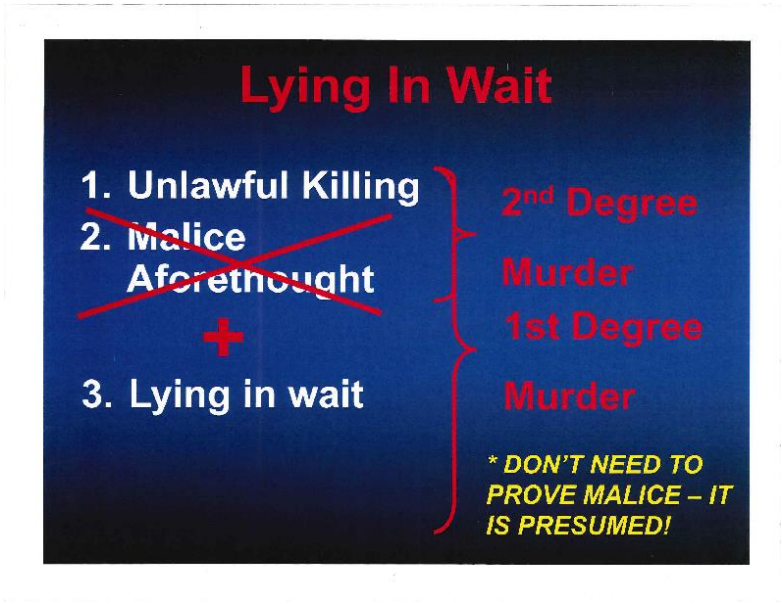
The prosecutor then spoke at length about lying-in-wait first degree murder: "If you go back there and deliberate and you say that this murder—this theory of murder is murder [by] lying in wait, then you don't need to go through the analysis of what I just talked about, willful, deliberate, and premeditation. *You don't need to talk about implied malice*, you don't need to talk about express malice, *if you decide that this murder was lying in wait*.

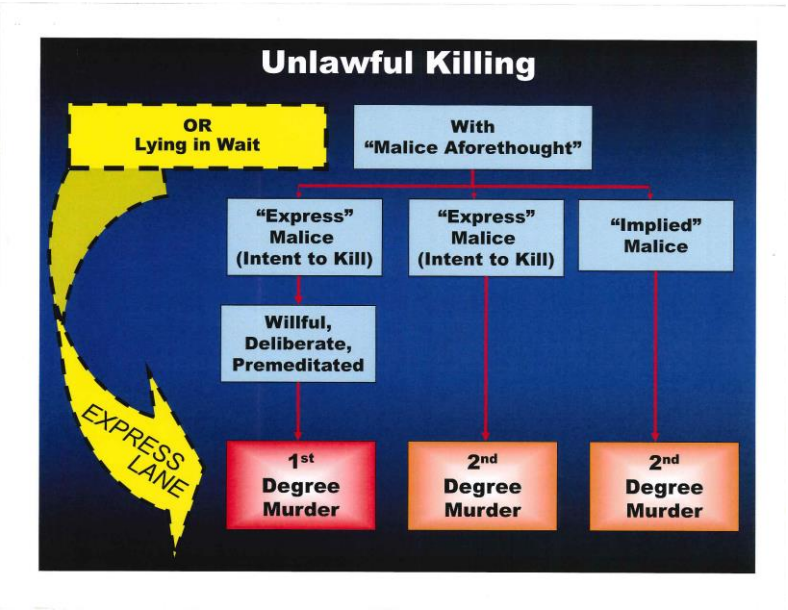
"[¶] . . . [¶]

"If you believe based on the evidence here that Mr. Dean was lying in wait, meaning he was sitting there ambushing an unsuspecting victim, Juan Renteria, in this case, you can reach murder that way as well, and that's lying in wait. And you can get to first degree through that theory. Remember, theories are just highways to get to a destination. If murder is the destination you can take it with malice murder, or you can take it with lying-in-wait murder. Both places will get you to the same location. Both theories will get you to murder. *You do not need*

to prove malice if you rely on lying in wait because malice is presumed; all right?" (Italics added.)

The prosecutor concluded his statements by referring to a chart he created "to sort of summarize" what he had "just said." The prosecutor included that chart in a PowerPoint presentation accompanying his closing argument. The presentation included the following two slides:





The first slide communicated that the People do not have to prove malice to prove Dean guilty of lying-in-wait first degree murder. The second slide illustrated this idea by showing the jurors that they can bypass the question of malice and convict Dean for first degree murder if they find he was lying in wait. Both of these slides reinforced the prosecutor's statements that the jury did not need to find malice to find Dean guilty of lying-in-wait first degree murder. Because malice, express or implied, is a necessary element of the crime of murder, the prosecutor's statements and slides misstated the law. (See §§ 187, 188; *People v. Rangel* (2016) 62 Cal.4th 1192, 1220.) This is because, although "[p]roof of lying-in-wait . . . acts as the functional equivalent of proof of premeditation, deliberation and intent to kill" (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 435-436; *People v. Ruiz* (1988) 44 Cal.3d 589, 614), to prove first degree murder "of any kind," including by lying in wait, the People must still "first establish a murder within section 187—that is, an unlawful

killing with malice aforethought," and thereafter "prove the murder was perpetrated by one of the specified statutory means, including lying in wait" (*People v. Stanley* (1995) 10 Cal.4th 764, 794; see *People v. Wright* (2015) 242 Cal.App.4th 1461, 1497 ["before there can be a lying in wait finding, there must be a murder finding"]).

3. *There Was No Rational Tactical Purpose for Not Objecting to the Prosecutor's Misstatements of Law*

"'[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' [citations], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.'" (*Centeno*, *supra*, 60 Cal.4th at p. 675; see *People v. Loza*, *supra*, 207 Cal.App.4th at p. 351.) "Nonetheless, deference to counsel's performance is not the same as abdication." (*Centeno*, at p. 675; see *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) Such deference "'must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions.'" (*Centeno*, at p. 675; *Ledesma*, *supra*, at p. 217.)

The problems with the prosecutor's argument and visual presentation were not difficult to discern. Both misstated the law by suggesting that the People did not need to prove malice for the jury to find Dean guilty of lying-in-wait first degree murder. The prosecutor's illustration of an "express lane" to first degree murder was particularly egregious and presented the misstatement of law in a way the jurors could easily remember and likely did. Because the prosecutor's statements attempted to

absolve the People of their obligation to prove every element of the crime of murder, "we can conceive of no reasonable tactical purpose for defense counsel's" failure to object. (*Centeno*, at p. 676; see *In re Wilson* (1992) 3 Cal.4th 945, 955-956 ["[c]ounsel's failure to raise a meritorious objection . . . as a result of ignorance or misunderstanding of the [law] rather than because of an informed tactical determination[ ] constitutes deficient performance"].)

4. *It Is Reasonably Likely That the Prosecutor's Misstatements Misled the Jury*

Statements by the court potentially ameliorated the misimpression left by the prosecutor's misstatements. The court fully and correctly instructed the jury on the elements of murder, including the requirement of acting with malice aforethought. In connection with its instruction on voluntary manslaughter, the court reiterated the instruction that the People had the burden of proving beyond a reasonable doubt that Dean "acted with the intent to kill or with conscious disregard for human life," which refers to the definitions of express and implied malice. Finally, the court admonished the jurors to follow its instructions in the event they conflicted with anything the attorneys said.[7]

The court also made a statement the jury might have interpreted to condone the prosecutor's "highway" analogy and, by extension, the improper content of the prosecutor's presentation. In particular, when the jury asked the court to explain the difference between lying-in-wait first degree murder

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[7] The prosecutor also told the jury at the outset of his closing argument that the court's instructions prevailed over anything he might say that contradicted the instructions.

and the lying-in-wait special circumstance, the court stated: "I think, as [the prosecutor] said in his argument, you've got different roads to the same place." As Dean argues, the court's discussion of the difference between lying-in-wait first degree murder and the lying-in-wait special circumstance in response to the jury's question was silent with respect to the elements of first degree murder, including malice. Thus, while the court's response was legally accurate, one or more jurors may have made a connection between the court's discussion of lying-in-wait first degree murder and the lying-in-wait special circumstance and the prosecutor's misstatements in his closing argument.

Under these circumstances, there is a reasonable likelihood that the jury believed it could find Dean guilty of lying-in-wait first degree murder without finding malice. The prosecutor repeatedly told the jury that it need not find malice to find Dean guilty of lying-in-wait first degree murder and graphically reinforced those misstatements through his PowerPoint presentation. Moreover, even though the court properly instructed on the elements of first and second degree murder, the jury may have interpreted the court's statements about the prosecutor's misleading highway analogy to condone the prosecutor's improper "express lane" to first degree murder by lying in wait. (See *Centeno*, *supra*, 60 Cal.4th at p. 674 ["[i]t is reasonably likely that the prosecutor's hypothetical and accompanying argument misled the jury about the applicable standard of proof and how the jury should approach its task"]; *People v. Hill*, *supra*, 17 Cal.4th at p. 832 ["[a]lthough the question arguably is close, we conclude it is reasonably likely [the prosecutor's] comments, taken in context, were understood by the

jury to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt"].)

5. *There Is No Reasonable Probability That the Outcome Would Have Been Different Had Counsel for Dean Objected to the Prosecutorial Misconduct*

A defendant "bears the burden of showing by a preponderance of the evidence that . . . counsel's deficiencies resulted in prejudice." (*Centeno*, *supra*, 60 Cal.4th at p. 674; see *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.) "'To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citations.] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citation.] In demonstrating prejudice, the appellant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel."'" (*People v. Loza*, *supra*, 207 Cal.App.4th at p. 350; accord, *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147; see *Centeno*, at p. 676.)

When a prosecutor's argument runs counter to the court's jury instructions, "'we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade."'" (*Centeno*, *supra*, 60 Cal.4th at p. 676; accord, *People v. Mendoza* (2007) 42 Cal.4th 686, 703; see *People v. Cortez*, *supra*, 63 Cal.4th at pp. 131-132.)

Nevertheless, to the extent the jury may have found Dean guilty of lying-in-wait first degree murder without considering whether he acted with malice, Dean was not prejudiced. Even if counsel for Dean had objected to the prosecutor's misstatements and the court had admonished the jury that it had to find express or implied malice to find Dean guilty of first degree murder by lying in wait, there is no reasonable probability that the jury would have failed to find beyond a reasonable doubt that Dean had acted with malice.

To find Dean guilty of first degree murder by lying in wait, the jury would have to find that he acted with at least implied malice. (See *People v. Stanley*, *supra*, 10 Cal.4th at pp. 794-795; *People v. Wright*, *supra*, 242 Cal.App.4th at p. 1497; see also *People v. Cage* (2015) 62 Cal.4th 256, 278 ["the lying-in-wait special circumstance requires intent to kill, while lying-in-wait murder requires only a wanton and reckless intent to inflict injury likely to cause death"].) As the court instructed the jury pursuant to CALCRIM No. 520, the elements of implied malice are (1) an intentional act, (2) the natural and probable consequences of which are dangerous to human life, (3) the defendant knew his act was dangerous to human life at the time he acted, and (4) the defendant acted deliberately and with conscious disregard for human life. (*People v. Martinez* (2007) 154 Cal.App.4th 314, 336; see *People v. Knoller* (2007) 41 Cal.4th 139, 152 [CALCRIM No. 520 states the requirements for implied malice].) The record is replete with evidence supporting each of these elements. (See *In re Hardy* (2007) 41 Cal.4th 977, 1021-1022 [we assess prejudice from ineffective assistance of counsel by considering, among other factors, the strength of the evidence of guilt produced at trial]; *People v. Reyes*, *supra*, 246 Cal.App.4th

at p. 78 ["[i]n light of the relatively strong evidence of [the defendant's] guilt, we cannot say any purported misconduct was prejudicial"]; *People v. Otero* (2012) 210 Cal.App.4th 865, 873-874 [the strength of the evidence against defendant supported the conclusion that prosecutorial misconduct did not cause prejudice].)

Dean admitted in his recorded police interview that Campos told him to "beat the hell out" of Renteria. Dean also admitted that the night before the attack, Campos drove him and Lavatai to Renteria's house to show them where Renteria lived and the truck he drove. Dean then prepared for the attack by donning a hoodie, gloves, and mask, and he brought a two-foot long metal pipe to use in the fight, all of which shows Dean intended to participate in much more than a verbal confrontation (as he testified) or even a fist fight. Dean then sat on the curb in front of Renteria's apartment, waiting for Renteria to come home, while Lavatai hid in the shadows. Again, Dean's conduct evidences something more nefarious than a verbal confrontation.

Dean admitted to the police that during the attack he hit Renteria with the metal pipe "a couple times." At trial, Renteria's sister testified that the blows to her brother's body were so hard that she could hear them from the doorway of the family's apartment, and her brother's attackers continued to beat him even after she screamed at them to stop. Renteria's brother Ricardo testified that he saw Dean swinging his weapon with both hands like a bat.

This evidence readily satisfied the first two elements of implied malice because a reasonable juror would necessarily conclude that Dean engaged in intentional acts, the natural and probable consequences of which were dangerous to human life.

Swinging a two-foot long metal pipe like a baseball bat is highly dangerous. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 138 [metal pole 12 to 18 inches long "is a deadly weapon" because it is "capable of inflicting great bodily injury or death"]; *People v. Huynh*, *supra*, 99 Cal.App.4th at p. 679 [steering wheel locking device consisting of two steel rods "would certainly constitute a deadly weapon"]; see also *People v. Cravens* (2012) 53 Cal.4th 500, 508-509 ["the manner of the assault and the circumstances under which it was made rendered the natural consequences of defendant's conduct dangerous to life"].)

The circumstances of the attack also demonstrate overwhelmingly that Dean knew his acts were highly dangerous and that he acted with conscious disregard for life. (See *People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1358 ["'implied malice may be proven by circumstantial evidence'"]; accord, *People v. McNally* (2015) 236 Cal.App.4th 1419, 1425.) The attack was coordinated, fierce, and one-sided. Unlike Dean and Lavatai, Renteria had no weapon, and he never escalated the fight using deadly force. Dean and Lavatai continued beating Renteria despite pleas from his family to stop, and well after Dean and Lavatai had "sen[t] the message" Dean said Campos "recruit[ed]" them to send. Even if Dean did not know that Lavatai had a weapon (which the People vigorously disputed at trial), these actions still evidence a conscious disregard for life. (See *People v. Cravens*, *supra*, 53 Cal.4th at p. 511 [implied malice shown where the defendant's behavior "demonstrated that this was not, as defendant suggest[ed], a simple fistfight"]; *People v. Cook* (2006) 39 Cal.4th 566, 596-597 [implied malice shown where the defendant beat the victim with a board rather than "simply start[ing] a fist fight"]; *People v. Guillen* (2014) 227 Cal.App.4th 934, 989-992 [based on

the circumstances of a jailhouse fight, a jury could reasonably conclude that defendants knew death could result from the fight].)

In light of this evidence, it is not reasonably probable that the jury would have found Dean acted without implied malice and convicted Dean of a lesser crime had his trial counsel objected to the prosecutor's misstatements of law regarding first degree murder by lying in wait. (See *In re Hardy*, *supra*, 41 Cal.4th at p. 1030; *People v. Neely* (2009) 176 Cal.App.4th 787, 796 ["but for counsel's error . . . [t]here is no reasonable probability that the verdict would have been more favorable to [the defendant]"]; see also *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1263 [jury could have easily concluded that defendant acted with knowledge of danger and with conscious disregard for the victim's life].)

Dean argues that because he "did not want to hurt anyone" and was "intoxicated at the time of the incident," "[t]he evidence at trial was such that a jury could have found that Lavatai, and not [Dean], acted with express or implied malice; or that neither [Dean] nor Lavatai acted with malice." The fact that Dean might not have intended for Renteria to die, however, does not negate a finding of implied malice. (See *People v. McNally*, *supra*, 236 Cal.App.4th at p. 1425 ["'[e]ven if the act results in a death that is accidental, as defendant contends was the case here, the circumstances surrounding the act may evince implied malice'"].) Similarly, voluntary intoxication does not negate implied malice where the defendant can form the requisite state of mind of knowing his conduct is dangerous to others and not caring if someone is hurt or killed. (*Id.* at p. 1426.) Nothing in the record suggests that Dean was so incapacitated that he could not have

known what he was doing or that his actions were dangerous. (See *People v. Carlson* (2011) 200 Cal.App.4th 695, 704 [the "'purposive nature'" of a defendant's conduct demonstrated awareness of her actions despite intoxication].) Dean's alleged intoxication would not have negated a finding of implied malice.

D. *Cumulative Errors Did Not Undermine the Fundamental Fairness of the Trial*

Dean argues that the combined effect of the errors he asserts occurred at his trial denied him his federal constitutional rights to due process and a fair trial. With the exception of the prosecutor's misconduct, which we conclude did not prejudice Dean, we have rejected Dean's arguments. Therefore, there is no cumulative error. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 155; *People v. Heard* (2003) 31 Cal.4th 946, 982.)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. KEENY, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.